

credit did not produce successful bidders among women and minority-owned applicants. In regional narrowband PCS, four of the nine winning bidders relied on a 40 percent bidding credit and installment payments to obtain licenses. Our auction experience has to date not included our current proposal to provide a small business bidding credit available on all blocks.

132. As discussed above, we propose to limit eligibility for bidding credits to small businesses and we also seek comment on whether this eligibility should be expanded to include businesses owned by minorities and/or women, even if they do not fall within our small business size standards for 900 MHz SMRs. In the event that we modify our bidding credit eligibility proposal to include minority and women-owned businesses, we also seek comment on a second bidding credit alternative, which would entitle small businesses, and minority and women-owned businesses to receive bidding credits on the five least encumbered blocks in each MTA.¹⁸⁹ In the event that we adopt our proposal to limit bidding credits to small businesses, should we also limit availability of the credit to the channel blocks with the fewest incumbents, or would this limitation dilute the effectiveness of a small business credit as a means of attracting broad designated entity participation in the 900 MHz SMR service? What bidding credit amounts should apply to women and minority-owned businesses and small businesses? Should women-owned and minority-owned businesses that are also small businesses receive an aggregated bidding credit? We seek comment on the ramifications of each proposal for the incumbents in each block. Finally, we seek comment on any possible alternative bidding credit schemes.

3. Reduced Down Payments/Installment Payments

133. We propose to adopt an installment payment option for small businesses that are winning bidders in the 900 MHz SMR auction. As we noted in the *Auctions Second Report & Order*, allowing installment payments reduces the amount of private financing needed by prospective small business licensees and therefore mitigates the effect of limited access to capital by small businesses, especially those owned by minorities and/or women.¹⁹⁰ Under this proposal, licensees who qualify for installment payments would be entitled to pay their winning bid amount in installments over the term of the license, with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. Under this proposed rule, qualified licensees would make interest-only payments during the first two years of the license term.¹⁹¹ Timely payment of all installments would be a condition of the license grant and failure to make such timely payment would be grounds for revocation of the license.

¹⁸⁹ RAM and Geotek generally support this model of limiting bidding credits to certain blocks. See RAM/Geotek Joint *ex parte* Presentation at 4.

¹⁹⁰ *Auctions Second Report & Order* at ¶¶ 231-232.

¹⁹¹ See, e.g., *Auctions Fifth Report & Order* at ¶ 138-139.

134. Additionally, we tentatively conclude that small businesses that are eligible for installment payments may pay a reduced down payment (five percent of the winning bid) five days after the auction closes, with the remaining five percent down payment due five days after Public Notice that the license is ready for grant. Under this proposal, the Commission would grant the license within ten (10) business days after receiving such down payment. We seek comment on these payment procedures. If we expand our installment payment eligibility proposal to women-owned and minority-owned entities, should we also provide them with reduced down payments provisions and, if so, on what terms? In the event we adopt provisions for minority and women-owned applicants, should enhanced installment payments be made available?

4. Eligibility for Bidding Credits, Installment Payments and Reduced Down Payments

135. We propose to limit eligibility for bidding credits, installment payments and reduced down payments to small businesses, including those owned by members of minority groups and women and those rural telephone companies that meet our small business size standards. As discussed below, we propose to define small businesses as those entities with less than \$3 million in average gross revenues for the preceding three years. We do not believe that it is necessary to develop different eligibility criteria for minority and women-owned entities that do not meet our small business size standards in order to achieve the goals of Section 309(j) in the 900 MHz SMR service. Nor do we believe that enhanced bidding credits or other measures for small businesses owned by minorities and/or women are necessary for this service. We believe that providing credits on all blocks and lowering the gross revenue threshold for small businesses, as discussed in ¶ 130, *supra*, will, in turn, create even more opportunities for minorities and women. For example, U.S. Census Data shows that approximately 99% of all women-owned businesses and 99% of all minority-owned businesses generated net receipts of \$1 million or less.¹⁹² Thus, we expect that we will capture the majority of minority and women-owned businesses within this category. Moreover, in light of Congress's instruction to "design and test multiple alternative methodologies"¹⁹³ we believe that the 900 MHz SMR service may be a suitable service in which to test more uniform measures, because capital entry requirements are expected to be lower than PCS and the spectrum is contaminated by incumbents who will not be required to relocate.

¹⁹² *Women-Owned Businesses*, WB 87-1, 1987 Economic Census, p. 144, Table 8; *Survey of Minority-Owned Business Enterprises*, MB 87-4, 1987 Economic Census, pp 81-82, Table 8. For purposes of this data, these are entities that earned at least \$500 and filed an IRS Form 1040, Schedule C, and in which at least 51% of the assets are owned by minorities or women. The definition of minorities is the same as that on which we seek comment here. (See proposed § 90.814(f)).

¹⁹³ 47 U.S.C. § 309(j)(3).

136. In designing our auction rules for broadband PCS, we observed that the different capital requirements of each spectrum-based service would influence our decision as to the types of provisions necessary for designated entities.¹⁹⁴ In that context, we decided that lack of access to capital for women and minorities becomes especially problematic for very costly spectrum-based services, such as broadband PCS¹⁹⁵ and nationwide narrowband PCS. As a result, we found that women and minorities could not overcome their difficulties in accessing capital without additional provisions.¹⁹⁶ We also decided that such targeted provisions may not be necessary in other less costly spectrum-based services.¹⁹⁷ Our expectation is that while 900 MHz MTA service may be a capital-intensive undertaking, it should require considerably less capital than PCS, thereby providing greater opportunities for participation by smaller businesses, including those owned by women and minorities. However, to enhance our understanding of the capital requirements the 900 MHz SMR service is likely to entail, we seek comment on the projected costs associated with acquisition, construction and operation of 900 MHz MTA licenses. In addition, to gain some insight into whether the level of small business participation in the current 900 MHz SMR service has resulted in opportunities for women and/or minority-owned businesses to play a meaningful role in this service, we ask for comment on the composition of existing 900 MHz SMR providers. What proportion of existing 900 MHz SMR businesses are owned by women or minorities? In this respect, we observe that the 900 MHz networks built by RAM and Geotek have relied to a certain extent upon entering into management agreements with local 900 MHz SMR operators.¹⁹⁸ We ask for comment as to what extent participants in 900 MHz SMR networks have been small businesses owned by minorities and women. What is the likelihood that such management agreements are likely to serve as a vehicle for participation in the 900 MHz SMR service by minority and women-owned businesses?

137. Whether or not we adopt our proposal only for small businesses, we intend to continue to request bidder information on the short-form filings as to minority and/or women-owned status, and, in analyzing the applicant pool and the auction results, we will monitor whether we have accomplished substantial participation by minorities and women through the broad provisions available to small businesses. This will also assist us in preparing our report

¹⁹⁴ *Auctions Fifth Report & Order* at ¶ 96.

¹⁹⁵ In the *Auctions Fifth Report & Order*, for example, we decided it was necessary to do more for minorities and women in an extremely capital-intensive service such as broadband PCS. *Id.* at ¶¶ 96 and 113.

¹⁹⁶ *Id.* at ¶¶ 96, 101.

¹⁹⁷ *Id.* at ¶ 96.

¹⁹⁸ *PowerSpectrum, Inc.*, 8 FCC Rcd 4452 (1993) at ¶ 7; *American Mobile Data Communications, Inc.*, 4 FCC Rcd 3802 (1989) at ¶¶ 5, 20.

to Congress on the success of designated entities in auctions.¹⁹⁹ If bidding credits only for small businesses proves unsuccessful in encouraging licenses won by a significant number of women and minority-owned entities, we retain discretion to tailor our approach for future auctions. We seek comment on this monitoring proposal.

138. Small Business Definition. In the *Auctions Second Memorandum Opinion & Order*, we stated we would define eligibility requirements for small businesses on a service-specific basis, taking into account the capital requirements and other characteristics of each particular service in establishing the appropriate threshold.²⁰⁰ With respect to eligibility in the 900 MHz auction for provisions available to small businesses, we believe that, because the 900 MHz SMR service is expected to be less capital-intensive than broadband PCS and regional narrowband PCS, where we adopted a \$40 million threshold,²⁰¹ and it encompasses a smaller amount of spectrum than PCS and less area than regional narrowband PCS, a much lower gross revenue threshold is warranted. Therefore, we propose to define a small business as an entity that, together with affiliates and attributable investors, has average gross revenues for the three preceding years of less than \$3 million. We believe this standard is appropriate for 900 MHz SMR service because build-out costs are likely to be much lower than those for broadband PCS and regional narrowband PCS. Additionally, the license supply (1,020) is more abundant and we believe that the costs of acquiring a 900 MHz SMR license are lower than for broadband or narrowband regional PCS licenses. We believe that many of the incumbents already licensed in the 900 MHz SMR service will fall within the \$3 million definition of small business.²⁰²

139. This small business definition is a variation of the definition used for broadband PCS,²⁰³ and is generally supported by AMTA.²⁰⁴ We seek comment on this proposal. Is this an appropriate threshold? Should it be higher or lower, based on the types of companies that are likely to benefit from the special provisions proposed here? We also tentatively conclude that we will consider the revenues of affiliates and certain investors and we propose to apply the 25 percent attribution threshold and affiliation rules similar to those used in the PCS

¹⁹⁹ See 47 U.S.C. § 309(j)(12)(D).

²⁰⁰ *Auctions Second Memorandum Opinion & Order* at ¶ 145.

²⁰¹ *Auctions Fifth Report & Order* at ¶ 175; *Auctions Third Memorandum Opinion & Order & Further Notice* at ¶ 46.

²⁰² AMTA *Ex Parte* Letter, filed Mar. 23, 1995, at 3.

²⁰³ *Auctions Fifth Report & Order* at ¶ 175.

²⁰⁴ AMTA *Ex Parte* Letter, filed Mar. 23, 1995, at 2-3.

auction rules.²⁰⁵ In other words, we will not attribute the gross revenues of investors that hold less than a 25 percent interest in the applicant, but we will include the gross revenues of the applicant's affiliates and investors with ownership interests of 25 percent or more in the applicant in determining whether an applicant qualifies as a small business. Is a different attribution threshold warranted for the 900 MHz SMR service? We seek comment on these issues.

140. If we adopt separate provisions for minority-owned and women-owned entities, we also seek comment on whether we should adopt the definition of minority-owned businesses and women-owned businesses contained in Section 1.2110(b)(2) of the Commission's rules, *i.e.*, businesses in which minorities and /or women who control the applicant, have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest. Under this rule, every general partner in a partnership either must be a minority and/or woman who individually or together own at least 50.1 percent of the partnership equity.²⁰⁶

5. Transfer Restrictions and Unjust Enrichment Provisions

141. In the *Auctions Fifth Report & Order*, we adopted restrictions on the transfer or assignment of licenses to ensure that designated entities do not take advantage of special provisions by immediately assigning or transferring control of their licenses.²⁰⁷ We propose to adopt these restrictions on transfer and assignment of licenses won by designated entities. Under this proposal, a designated entity would be prohibited from voluntarily assigning or transferring control of its license to any other entity during the three years after license grant.²⁰⁸ In addition, in the fourth and fifth years of the license term, the designated entity would only be able to assign or transfer control of its license to another qualified designated entity.²⁰⁹ Finally, if a designated entity were to assign or transfer its license during years four or five of the license term, no unjust enrichment could be gained through the transfer. Therefore, if the entity to which the designated entity transfers/assigns the license is not eligible for the same provisions, then the difference would have to be paid back to the U.S. Treasury as a condition of approval of the transfer or assignment.²¹⁰ We seek comment on these proposals.

²⁰⁵ See, *e.g.*, 47 C.F.R. §§ 24.320(b)(2)(iv); 24.720(j)(1).

²⁰⁶ See *id.* § 1.2110(b)(2).

²⁰⁷ *Auctions Fifth Report & Order* at ¶ 128.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at ¶ 134.

142. For the remainder of the license term, we propose to continue to impose unjust enrichment rules on designated entities. The Commission's unjust enrichment provisions are integral to the success of the special provisions provided to designated entities in the various auctionable services. In the *Auctions Second Report & Order*, we outlined unjust enrichment provisions applicable specifically to designated entities. We established these provisions to deter speculation and participation in the licensing process by those who do not intend to offer service to the public, or who intend to use our provisions to obtain a license at a lower cost than they otherwise would have to pay, and later to sell it for a profit.²¹¹

143. Under this proposal, licensees seeking to transfer their licenses for profit, as a condition to approval of the transfer, would have to remit to the government a payment equal to a portion of the total value of the benefit conferred by the government. Therefore, if a designated entity making installment payments sells its license to an entity that does not qualify as a designated entity, we would require payment of the remaining principal and any interest accrued through the date of assignment as a condition of the license assignment or transfer.²¹² If a transfer is made to another eligible designated entity, no penalty would be assessed against the original designated entity license holder. If bidding credits were awarded to a licensee, we will require the licensee seeking approval for a transfer of control or an assignment of license to a non-designated entity, or who proposes to take any other action relating to ownership or control that would result in loss of status as an eligible designated entity, to reimburse the government for the amount of the bidding credit before transfer of the license will be permitted.²¹³ We propose to apply these payment requirements for the entire license term to ensure that designated entities will look first to other designated entities, when deciding to transfer their licenses. We seek comment on this proposal.

6. Rural Telephone Company Partitioning

144. Congress directed the Commission to ensure that, together with other designated entities, rural telephone companies have the opportunity to participate in the provision of spectrum-based services. Rural areas, because of their more dispersed populations, tend to be less profitable to serve than more densely populated urban areas. Therefore, service to these areas may not be a priority or economically feasible for many licensees. Rural telephone companies, however, are well positioned because of their existing infrastructure to serve these areas. Therefore, we propose a geographic partitioning scheme similar to that adopted in broadband PCS,²¹⁴ which will encourage participation by rural telephone companies, thereby increasing the likelihood of rapid introduction of service to rural areas.

²¹¹ *Auctions Second Report and Order* at ¶ 259.

²¹² See, e.g., *id.* § 24.711(c)(1).

²¹³ See, e.g., 47 C.F.R. § 24.712(d)(2).

²¹⁴ *Auctions Fifth Report and Order* at ¶ 150.

145. This partitioning scheme would prevent rural telephone companies from having to bid on the entire MTA license to obtain licenses covering their wireline service areas. In addition, partitioning would provide rural telephone companies with the flexibility to be able to serve areas in which they already provide service, while the remainder of the service area could be served by other providers.²¹⁵ Under this proposal, rural telephone companies would be permitted to acquire partitioned 900 MHz SMR licenses in either of two ways: (1) they may form bidding consortia consisting entirely of rural telephone companies to participate in auctions, and then partition the licenses won among consortia participants; and (2) they may acquire partitioned 900 MHz SMR licenses from other licensees through private negotiation and agreement either before or after the auction.²¹⁶ We would also require that partitioned areas conform to established geopolitical boundaries and that each area include all portions of the wireline service area of the rural telephone company applicant that lies within the service area.²¹⁷ We also propose to use the definition for rural telephone companies implemented in the *Auctions Fifth Report & Order* for broadband PCS. Rural telephone companies would be defined as local exchange carriers having 100,000 or fewer access lines, including all affiliates.²¹⁸ We seek comment on this proposal.

7. Other Provisions

146. Reduced Upfront Payments. We propose not to adopt a reduced upfront payment option in the 900 MHz SMR service for designated entities. Considering the other provisions adopted here (*i.e.*, bidding credits, installments payments and reduced down payments) we believe a reduced upfront payment option is unnecessary and, in the absence of an entrepreneur's block, may be too costly to administer in the 900 MHz SMR service. Moreover, we want to ensure sincere bidding by all parties. We seek comment on this proposal. If we adopt provisions for minority and women-owned entities, should we apply a reduced upfront payment provision to those entities only?

147. Set-aside Spectrum. In the *Auctions Fifth Report & Order* we established entrepreneurs' blocks on which only qualified entrepreneurs, including designated entities, could bid.²¹⁹ We tentatively conclude not to adopt an entrepreneurs' block for the 900 MHz SMR auction for several reasons. First, the large numbers of licenses available and relatively small spectrum allocations in the 900 MHz SMR service should allow for extensive small

²¹⁵ *Id.*

²¹⁶ *Id.* at ¶ 151.

²¹⁷ *Id.*

²¹⁸ *Id.* at ¶ 193.

²¹⁹ *Id.* at ¶¶ 113-123. These rules were further refined in the *Auctions Fifth Memorandum Opinion & Order*. See 47 C.F.R. § 24.709.

business participation. Second, unlike broadband PCS, we do not believe that the effectiveness of bidding credits, reduced down payments and installment payments will be diluted, due to the smaller capital outlay anticipated for this service. Third, it may be impractical to choose particular blocks to set aside for bidding solely by entrepreneurs, because each of the 20 channel blocks is encumbered in approximately 19 of the 46 DFAs.²²⁰

We request comment on this proposal. Are the capital requirements of this service anticipated to be so substantial that we should insulate certain blocks from very large bidders in order to provide meaningful opportunities for designated entities?

VI. CONCLUSION

148. We believe that the service rules adopted in this Order and the auction proposals set forth for 900 MHz SMR licenses in the Further Notice will promote the public policy goals set forth by Congress. The rules and proposals should facilitate the rapid implementation of the 900 MHz SMR service, thus advancing the public interest by fostering economic growth of new competitive new services via efficient spectrum use. The proposed rules will allow the public to recover a portion of the value of the public spectrum, and will promote access to 900 MHz SMR services by consumers, producers, and new entrants by ensuring that designated entities will have genuine opportunities to participate in the auctions and in the provision of service. At the same time, we believe that the technical rules adopted and clarified herein strike the proper balance between the rights of incumbent licensees in the 900 MHz SMR spectrum, and new MTA licensees.

VII. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

149. With respect to this Second Report & Order, pursuant to the Regulatory Flexibility Act of 1980, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking in GN Docket No. 93-252. Written comments on the IRFA were requested. The Commission's final analysis is as follows:

150. Need for and purpose of the action. This rulemaking proceeding was initiated to implement Sections 332 and 3(n), respectively, of the Communications Act, as amended. The rules adopted herein will carry out Congress's intent to establish a consistent regulatory framework for all commercial mobile radio service (CMRS).

151. Issues raised in response to the IRFA. No comments were submitted in response to the IRFA in GN Docket No. 93-252.

²²⁰ See also RAM/Geotek Supplementary Joint *Ex Parte* Presentation at 1.

152. Significant alternatives considered and rejected. All significant alternatives have been addressed in the *Second Report & Order*, and the *CMRS Third Report & Order*.

153. With respect to this Second Further Notice of Proposed Rulemaking, an Initial Regulatory Flexibility Analysis is contained in Appendix B. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Further Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Further Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et. seq.* (1981).

B. Ex Parte Rules--Non-Restricted Proceeding

154. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

C. Comment Dates

155. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before May 24, 1995, and reply comments on or before June 1, 1995. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

D. Ordering Clauses

156. Authority for issuance of this Second Further Notice of Proposed Rule Making is contained in Section 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j).

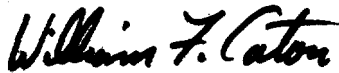
157. Accordingly, IT IS ORDERED that Part 90 of the Commission's Rules is amended as set forth in the attached Appendix A.

158. IT IS FURTHER ORDERED that the rules changes made herein WILL BECOME EFFECTIVE 30 days after their publication in the Federal Register. This action is taken pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

E. Contact Person

159. For further information concerning this proceeding, contact David Furth or Rosalind K. Allen at (202) 418-0620 (Wireless Telecommunications Bureau, Commercial Wireless Division).

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, reading "William F. Caton". The signature is written in a cursive style with a large, stylized "W" and "C".

William F. Caton
Acting Secretary

APPENDIX A FINAL RULES

Part 90 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 90 -- PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 is revised to read as follows:

Authority: Sections 4, 303, 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303, 309 and 332, unless otherwise noted.

2. Section 90.7 is amended by adding the definition for "MTA license" following the definition for "Mobile station" to read as follows:

§ 90.7 Definitions.

* * * * *

MTA-based license or MTA license. A license authorizing the right to use a specified block of SMR spectrum within one of the 51 Major Trading Areas ("MTAs"), as embodied in Rand McNally's Trading Area System MTA Diskette and geographically represented in the map contained in Rand McNally's *Commercial Atlas & Marketing Guide* (the "MTA Map.") The MTA Listings, the MTA Map and the Rand McNally/AMTA license agreement are available for public inspection at the Wireless Telecommunications Bureau's public reference room, Room 628, 1919 M Street N.W. Washington D.C. 20554.

* * * * *

3. Section 90.617 is amended by revising paragraph (d), introductory text, to read as follows:

§ 90.617 Frequencies in the 809.750-824/854.750-869 MHz, and 896-901/935-940 MHz bands available for trunked or conventional system use in non-border areas.

* * * * *

(d) The channels listed in Tables 4A and 4B are available only to eligibles in the SMR category, which consists of Specialized Mobile Radio (SMR) stations and eligible end users. The frequencies listed in Table 4B are available to SMR eligibles desiring to be authorized on MTA service areas in accordance with Section 90.661. SMR licensees licensed on the channels listed in Table 4B on or before August 9, 1994 may continue to utilize these frequencies within their existing service areas, as provided in Section 90.661. This paragraph

deals with the assignment of frequencies only in areas farther than 110 km (68.4 miles) from the U.S./Mexico border and farther than 140 km (87 miles) from the U.S./Canada border. See § 90.619 for the assignment of SMR frequencies in these border areas. For stations located within 113 km (70 miles) of Chicago, channels 401-600 will be assigned in groups as outlined in Table 4C.

* * * * *

4. Section 90.631 is amended by revising paragraphs (f) and (i) to read as follows:

§ 90.631 Trunked systems loading, construction and authorization requirements.

* * * * *

(f) If a station is not placed in permanent operation, in accordance with the technical parameters of the station authorization, within one year, except as provided in § 90.629, its license cancels automatically and must be returned to the Commission. For purposes of this section, a base station is not considered to be placed in operation unless at least two associated mobile stations, or one control station and one mobile station, are also placed in operation. An SMR licensee with facilities that have discontinued operations for 90 continuous days is presumed to have permanently discontinued operations, unless the licensee notifies the FCC otherwise prior to the end of the 90 day period and provides a date on which operation will resume, which date must not be in excess of 30 additional days.

* * * * *

(i) For SMRS category trunked systems licensed in the 896-901/935-940 MHz band (other than MTA-licensed systems), if at the end of the initial five-year license term the licensee of such a trunked system has not satisfied the loading requirements of paragraph (b) of this section, the licensee requesting renewal of its license will be granted a renewal for only a two-year period. Regardless of the date of grant of the two-year renewal, the licensee will be required to comply fully with the minimum requirements set forth in paragraph (b) of this section at the end of the two-year renewal term. As an exception to this requirement, if the licensee obtains the MTA license covering its assigned spectrum in accordance with Sections 90.661 through 90.671, these loading requirements will no longer be applicable and the coverage requirements of Section 90.665 will govern.

5. Subpart S is amended by adding a new heading following Section 90.659 to read as follows:

POLICIES GOVERNING THE LICENSING AND USE OF MTA-BASED SMR SYSTEMS IN THE 896-901/935-940 MHZ BAND.

6. A new Section 90.661 is added to Subpart S to read as follows:

§ 90.661 MTA-based SMR service areas.

MTA licenses for SMR spectrum blocks in the 896-901/935-940 MHz band listed in Table 4B of Section 90.617(d) are available in 51 Major Trading Areas (MTAs) as defined in Section 90.7. Within these MTAs, licenses will be authorized in ten channel blocks as specified in Table 4B of Section 90.617(d) through the competitive bidding procedures described in Subpart U of this Part.

7. A new Section 90.663 is added to Subpart S to read as follows:

§ 90.663 MTA-based SMR system operations.

(a) MTA-based licensees authorized in the 896-901/935-940 MHz band pursuant to Section 90.661 may construct and operate base stations using any frequency identified in their spectrum block anywhere within their authorized MTA, provided that:

(1) The MTA licensee affords protection, in accordance with Section 90.621(b), to all sites for which applications were filed on or prior to August 9, 1994.

(2) The MTA licensee complies with any rules and international agreements that restrict use of frequencies identified in their spectrum block, including the provisions of Section 90.619 relating to U.S./Canadian and U.S./Mexican border areas.

(3) The MTA licensee limits its field strength at any location on the border of the MTA service area in accordance with Section 90.671 and masks its emissions in accordance with Section 90.669.

(b) In the event that the authorization for a previously authorized co-channel station within the MTA licensee's authorized spectrum block is terminated or revoked, the MTA licensee's co-channel obligations to such station will cease upon deletion of the facility from the Commission's licensing record. The MTA licensee then will be able to construct and operate base stations using such frequency.

8. A new Section 90.665 is added to Subpart S to read as follows:

§ 90.665 Authorization, construction and implementation of MTA licenses.

(a) MTA licenses in the 896-901/935-940 MHz band will be issued for a term not to exceed ten years.

(b) MTA licensees in the 896-901/935-940 MHz band will be permitted five years to construct their stations. This five-year period will commence with the issuance of the MTA-

wide authorization and will apply to all of the licensee's stations within the MTA spectrum block, including any stations that may have been subject to an earlier construction deadline arising from a pre-existing authorization.

(c) MTA licensees in the 896-901/935-940 MHz band must, within three years, construct and place into operation a sufficient number of base stations to provide coverage to at least one-third of the population of the MTA. Further, each MTA licensee must provide coverage to at least two-thirds of the population of the MTA within five years or, alternatively, submit a showing to the Commission demonstrating that they are providing substantial service.

(d) MTA licensees who fail to meet the coverage requirements imposed at either the third or fifth years of their construction period, or to make a convincing showing of substantial service, will forfeit their entire MTA license.

9. A new Section 90.667 is added to Subpart S to read as follows:

§ 90.667 Grandfathering provisions for incumbent licensees.

(a) These provisions apply to all 900 MHz SMR licensees who obtained licenses or filed applications on or before August 9, 1994 ("incumbent licensees"). An incumbent licensee's service area shall be defined by its originally-licensed 40 dBu signal strength contour. Incumbent licensees are permitted to add new transmit sites in this existing service area without prior notification to the Commission so long as their original 40 dBu signal strength contour is not expanded. Incumbents will be required to notify the Commission of any changes in technical parameters or additional stations constructed with a minor modification application. These minor modification applications will not be subject to public notice and petition to deny requirements or mutually exclusive applications.

(b) Applications in the 900 MHz SMR service for secondary sites filed after August 9, 1994 shall be authorized on a secondary, non-interference basis to MTA licensee operations. No secondary sites shall be granted on this basis in an MTA once the MTA licensee has been selected.

10. A new Section 90.669 is added to Subpart S to read as follows:

§ 90.669 Emission limits.

(a) On any frequency in an MTA licensee's spectrum block that is adjacent to a non-MTA frequency, the power of any emission shall be attenuated below the transmitter power (P) by at least $43 + 10 \log_{10}(P)$ decibels or 80 decibels, whichever is the lesser attenuation.

NOTE: The measurements of emission power can be expressed in peak or average values, provided they are expressed in the same parameters as the transmitter power.

(b) When an emission outside of the authorized bandwidth causes harmful interference, the Commission may, at its discretion, require greater attenuation than specified in this section.

11. A new Section 90.671 is added to Subpart S to read as follows:

§ 90.671 Field strength limits.

The predicted or measured field strength at any location on the border of the MTA service area for MTA licensees shall not exceed 40 dBuV/m unless all bordering MTA licensees agree to a higher field strength. MTA licensees are also required to coordinate their frequency usage with co-channel adjacent MTA licensees and all other affected parties. To the extent that a single entity obtains licenses for adjacent MTAs on the same channel block, it will not be required to coordinate its operations in this manner. In the event that this standard conflicts with the MTA licensee's obligation to provide co-channel protection to incumbent licensees under Section 90.621(b), the requirements of Section 90.621(b) shall prevail.

APPENDIX B PROPOSED RULES

12. A new subpart U consisting of §§ 90.801 through 90.814 is proposed to be added to Part 90 to read as follows:

Subpart U -- Competitive Bidding Procedures for 900 MHz Specialized Mobile Radio

Sec.

- 90.801 900 MHz SMR subject to competitive bidding.
- 90.802 Competitive bidding design for 900 MHz SMR licensing.
- 90.803 Competitive bidding mechanisms.
- 90.804 Aggregation of 900 MHz SMR licenses.
- 90.805 Withdrawal, default and disqualification payments.
- 90.806 Bidding application (FCC Form 175 and 175-S Short-form).
- 90.807 Submission of upfront payments and down payments.
- 90.808 Long-form applications.
- 90.809 License grant, denial, default, and disqualification.
- 90.810 Bidding credits for small businesses.
- 90.811 Reduced down payment for licenses won by small businesses.
- 90.812 Installment payments for licenses won by small businesses.
- 90.813 Procedures for partitioned licenses.
- 90.814 Definitions.

§ 90.801 900 MHz SMR subject to competitive bidding.

Mutually exclusive initial applications to provide 900 MHz SMR service are subject to competitive bidding procedures. The general competitive bidding procedures found in 47 CFR Part 1, Subpart Q will apply unless otherwise provided in this part.

§ 90.802 Competitive bidding design for 900 MHz SMR licensing.

The Commission will employ a simultaneous multiple round auction design when choosing from among mutually exclusive initial applications to provide 900 MHz SMR service, unless otherwise specified by the Wireless Telecommunications Bureau before the auction.

§ 90.803 Competitive bidding mechanisms.

- (a) Sequencing. The Commission will establish and may vary the sequence in which 900 MHz SMR licenses will be auctioned.
- (b) Grouping. All 900 MHz SMR licenses for each of the MTAs will be auctioned simultaneously, unless the Wireless Telecommunications Bureau announces, by Public Notice prior to the auction, an alternative auction scheme.

(c) Minimum Bid Increments. The Commission will, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms.

(d) Stopping Rules. The Commission will establish stopping rules before or during multiple round auctions in order to terminate an auction within a reasonable time.

(e) Activity Rules. The Commission will establish activity rules which require a minimum amount of bidding activity. In the event that the Commission establishes an activity rule in connection with a simultaneous multiple round auction, each bidder will be entitled to request and will be automatically granted a certain number of waivers of such rule during the auction.

§ 90.804 Aggregation of 900 MHz SMR licenses.

The Commission will license each 10-channel block in the 900 MHz SMR spectrum separately. Applicants may aggregate across spectrum blocks within the limitation specified in § 20.6(b) of this Chapter.

§ 90.805 Withdrawal, default and disqualification payments.

(a) During the course of an auction conducted pursuant to § 90.802, the Commission will impose payments on bidders who withdraw high bids during the course of an auction, who default on payments due after an auction closes, or who are disqualified.

(b) Bid withdrawal prior to close of auction. A bidder who withdraws a high bid during the course of an auction will be subject to a payment equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal payment would be assessed if the subsequent winning bid exceeds the withdrawn bid. This payment amount will be deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission.

(c) Default or disqualification after close of auction. If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the payment in paragraph (1) of this section plus an additional penalty equal to three (3) percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent payment will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission.

§ 90.806 Bidding application (FCC Form 175 and 175-S Short-form).

All applicants to participate in competitive bidding for 900 MHz SMR licenses must submit applications on FCC Forms 175 and 175-S pursuant to the provisions of § 1.2105 of this Chapter. The Wireless Telecommunications Bureau will issue a Public Notice announcing the availability of 900 MHz SMR licenses and, in the event that mutually exclusive applications

are filed, the date of the auction for those licenses. This Public Notice also will specify the date on or before which applicants intending to participate in a 900 MHz SMR auction must file their applications in order to be eligible for that auction, and it will contain information necessary for completion of the application as well as other important information such as the materials which must accompany the Forms, any filing fee that must accompany the application or any upfront payment that will need to be submitted, and the location where the application must be filed. In addition to identifying its status as a small business or rural telephone company, each applicant must indicate whether it is a minority-owned entity, as defined in § 90.814(g) and/or a women-owned entity.

§ 90.807 Submission of upfront payments and down payments.

(a) Bidders in the 900 MHz SMR auction will be required to submit an upfront payment of \$0.02 per pop per MHz, in accordance with § 1.2106 of this Chapter.

(b) Winning bidders in a 900 MHz SMR auction must submit a down payment to the Commission in an amount sufficient to bring their total deposits up to 20 percent of their winning bids, and in accordance with § 1.2107(b) of this Chapter, except for small businesses that are winning bidders, which are governed by § 90.811.

§ 90.808 Long-form applications.

Each winning bidder will be required to submit a long-form application on FCC Form 600 within ten (10) business days after being notified by Public Notice that it is the winning bidder. Applications on FCC Form 600 shall be submitted pursuant to the procedures set forth in 90.119 of this Part and any associated Public Notices. Only auction winners (and rural telephone companies seeking partitioned licenses pursuant to agreements with auction winners under § 90.813) will be eligible to file applications on FCC Form 600 for initial 900 MHz SMR licenses in the event of mutual exclusivity between applicants filing Form 175.

§ 90.809 License grant, denial, default, and disqualification.

(a) Except with respect to entities eligible for installment payments (see § 90.812) each winning bidder will be required to pay the balance of its winning bid in a lump sum payment within five (5) business days following Public Notice that the license is ready for grant. The Commission will grant the license within ten (10) business days after receipt of full and timely payment of the winning bid amount.

(b) A bidder who withdraws its bid subsequent to the close of bidding, defaults on a payment due, or is disqualified, will be subject to the payments specified in § 90.805 of this Part or § 1.2109 of this Chapter, as applicable.

(c) MTA licenses pursued through competitive bidding procedures will be granted pursuant to the requirements specified in § 90.166.

§ 90.810 Bidding credits for small businesses.

(a) A winning bidder that qualifies as a small business or a consortium of small businesses, (as defined in § 90.814) may use a bidding credit of 10 percent to lower the cost of its winning bid on any of the blocks identified in § 90.617(d), Table 4B of this Part.

(b) Unjust Enrichment.

(1) If a licensee that utilizes a bidding credit under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for bidding credits or seeks to make any other change in ownership that would result in the licensee no longer qualifying for bidding credits under this section, the licensee must seek Commission approval of such assignment, transfer or other ownership change.

(2) If a licensee that utilizes a bidding credit under this section seeks to assign or transfer control of its license to an entity meeting the eligibility standards for lower bidding credits or seeks to make any other change in ownership that would result in the licensee qualifying for a lower bidding credit under this section, the licensee must seek Commission approval and reimburse the government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee or licensee is eligible under this section as a condition of the approval of such assignment, transfer or other ownership change.

§ 90.811 Reduced down payment for licenses won by small businesses.

Each winning bidder that qualifies as a small business shall make a down payment equal to ten percent of its winning bid (less applicable bidding credits); a winning bidder shall bring its total amount on deposit with the Commission (including upfront payment) to five percent of its net winning bid within five (5) business days after the auction closes, and the remainder of the down payment (five percent) shall be paid within five (5) business days following Public Notice that the license is ready for grant. The Commission will grant the license within ten (10) business days after receipt of the remainder of the down payment.

§ 90.812 Installment payments for licenses won by small businesses.

(a) Each licensee that qualifies as a small business may pay the remaining 90 percent of the net auction price for the license in installment payments pursuant to § 1.2110(e) of this Chapter.

(b) Interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent; payments shall include interest only for the first two years and payments of interest and principal amortized over the remaining eight years of the license term.

(c) Unjust Enrichment.

(1) If a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval.

(2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensee shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of such change as a condition of approval.

§ 90.813 Procedures for partitioned licenses.

(a) Notwithstanding § 90.661, an applicant that is a rural telephone company, as defined in § 90.814, may be granted a 900 MHz SMR license that is geographically partitioned from a separately licensed MTA, so long as the MTA applicant or licensee has voluntarily agreed (in writing) to partition a portion of the license to the rural telephone company.

(b) If partitioned licenses are being applied for in conjunction with a license(s) to be awarded through competitive bidding procedures --

(1) The applicable procedures for filing short-form applications and for submitting upfront payments and down payments contained in this Part and Part 1 of this Chapter shall be followed by the applicant, who must disclose as part of its short-form application all parties to agreement(s) with or among rural telephone companies to partition the license pursuant to this section, if won at auction (*see* 47 CFR §1.2105(a)(2)(viii));

(2) Each rural telephone company that is a party to an agreement to partition the license shall file a long-form application for its respective, mutually agreed-upon geographic area together with the application for the remainder of the MTA filed by the auction winner.

(c) If the partitioned license is being applied for as a partial assignment of the MTA license following grant of the initial license, request for authorization for partial assignment of a license shall be made pursuant to § 90.153.

(d) Each application for a partitioned area (long-form initial application or partial assignment application) shall contain a partitioning plan that must propose to establish a partitioned area to be licensed that meets the following criteria:

- (1) Conforms to established geopolitical boundaries (such as county lines);
- (2) Includes the wireline service area of the rural telephone company applicant; and
- (3) Is reasonably related to the rural telephone company's wireline service area.

Note: A partitioned service area will be presumed to be reasonably related to the rural telephone company's wireline service area if the partitioned service area contains no more than twice the population overlap between the rural telephone company's wireline service area and the partitioned area.

(e) Each licensee in each partitioned area will be responsible for meeting the construction requirements in its area (see § 90.665).

§ 90.814 Definitions.

(a) Scope. The definitions in this section apply to §§ 90.810 through 90.813, unless otherwise specified in those sections.

(b) Small Business: Consortium of Small Businesses.

(1) A small business is an entity that, together with its affiliates and persons or entities that

hold attributable interests in such entity and their affiliates, has average gross revenues for the three preceding years of less than \$3 million.

(2) A small business consortium is conglomerate organization formed as a joint venture between or among mutually-independent business firms, each of which individually satisfies the definition of a small business in paragraphs (b)(1) and (b)(2) of this section.

(c) *Rural Telephone Company.* A rural telephone company is a local exchange carrier having 100,000 or fewer access lines, including all affiliates.

(d) *Gross Revenues.* Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited financial statements for the relevant number of calendar years preceding January 1, 1994, or, if audited financial statements were not prepared on a calendar-year basis, of the most recently completed fiscal years preceding the filing of the applicant's short-form application (Form 175). For applications filed after December 31, 1994, gross revenues shall be evidenced by audited financial statements for the preceding relevant number of calendar or fiscal years. If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate.

(e) *Businesses Owned by Members of Minority Groups and/or Women.* A business owned by members of minority groups and/or women is one in which minorities and/or women who are U.S. citizens control the applicant, have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest. For applicants that are partnerships, every general partner either must be a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50.1 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully-diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by non-controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis.

(f) *Members of Minority Groups.* Members of minority groups includes Blacks, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders.

(g) *Nonattributable Equity.* Nonattributable equity shall mean:

(i) For corporations, voting stock or non-voting stock that includes no more than 25 percent of the total voting equity, including the right to vote such stock through a voting trust or other arrangement;

(ii) For partnerships, joint ventures and other non-corporate entities, limited partnership interests and similar interests that do not afford the power to exercise control of the entity.

(h) *Affiliate.*

(1) *Basis for Affiliation.* An individual or entity is an affiliate of an applicant or of a person

holding an attributable interest in an applicant (both referred to herein as "the applicant") if such individual or entity:

- (i) Directly or indirectly controls or has the power to control the applicant, or
- (ii) Is directly or indirectly controlled by the applicant, or
- (iii) Is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or
- (iv) Has an "identity of interest" with the applicant.

(2) Nature of control in determining affiliation.

(i) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example for paragraph (h)(2)(i). An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power of control.

(ii) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(iii) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

Example for paragraph (h)(2)(iii). In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(3) Identity of interest between and among persons. Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or is controlled by a concern, persons with an identity of interest will be treated as though they were one person.

Example 1. Two shareholders in Corporation Y each have attributable interests in the same SMR application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. The two shareholders with these common investments (or identity of interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

Example 2. One shareholder in Corporation Y, shareholder A, has an attributable interest in a SMR application. Another shareholder in Corporation Y, shareholder B, has a

nonattributable interest in the same SMR application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. Through the common investment of shareholders A and B in the SMR application, Corporation Y would still be deemed an affiliate of the applicant.

(i) *Spousal Affiliation*. Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States.

(ii) *Kinship Affiliation*. Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father, or -mother, step-brother, or -sister, step-son, or -daughter, half brother or sister. This presumption may be rebutted by showing that

(A) The family members are estranged,

(B) The family ties are remote, or

(C) The family members are not closely involved with each other in business matters.

Example for paragraph (h)(3)(ii). A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in an SMR application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation X is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(4) *Affiliation through stock ownership*.

(i) An applicant is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(ii) An applicant is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(iii) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(5) *Affiliation arising under stock options, convertible debentures, and agreements to merge*. Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements will generally be treated as though the rights held thereunder had been exercised. However, neither an affiliate nor an applicant can use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1 for paragraph (h)(5). If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in an SMR application, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into

account in determining the size of the applicant.

Example 2 for paragraph (h)(5). If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in an SMR application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company, and thus the applicant, until SmallCo actually exercises its options to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3 for paragraph (h)(5). If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(6) Affiliation under voting trusts.

(i) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(ii) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(iii) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(7) Affiliation through common management. Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(8) Affiliation through common facilities. Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(9) Affiliation through contractual relationships. Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(10) Affiliation under joint venture arrangements.

(i) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(ii) The parties to a joint venture are considered to be affiliated with each other.